

In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. See 86 Ill. Adm. Code 130.1940. (This is a GIL.)

November 8, 2004

Dear Xxxxx:

This letter is in response to your letter dated August 20, 2004, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

Someone from the Department asked that I forward a copy of my letter of December 4, 2003, addressed to the Illinois Department of Revenue Sales and Use Tax Department to your attention for further clarification. They also indicated that they were forwarding this directly to you, but I have not heard anything to date in writing from either the Sales and Use Tax Department or your office.

Please let me know if any additional information is necessary.

In your letter of December 4, 2003, you have stated as follows:

FACTS. Our client, ABC, a STATE corporation, operates a building supply business. ABC delivers trusses and Custom Home Packages to Illinois and would like to clarify its tax reporting obligations with respect to said deliveries. ABC is authorized to do business in Illinois.

TRUSSES. ABC purchases lumber, metal fasteners and nails to produce 'Trusses' for resale. From time to time, these Trusses are sold to Illinois customers and are delivered via ABC trucks to the Customer's job site. ABC is currently not reporting or collecting any sales or use tax to STATE or Illinois on these sales. At other times, the Trusses are sold to Illinois customers on an 'installed' basis. Under either scenario, title does not pass to ABC's customer until delivery (uninstalled basis) or until affixed to the real estate (installed basis). ABC is currently paying STATE use tax on sales made and

delivered to Illinois job site on an installed basis. ABC is requesting clarification of its sales and use tax liability in Illinois on:

- (1) Trusses sold to Illinois residents and delivered to an Illinois job site; and
- (2) Trusses sold on an installed basis and installed by ABC at an Illinois Job site.

Our initial review of the facts with respect to Truss sales indicates that ABC should obtain an Illinois Sales and Use Tax number and begin collecting use tax on deliveries Illinois job sites on an uninstalled basis. ABC should be paying and collecting STATE use tax on Trusses delivered and installed in Illinois on an installed basis. Trusses sold on an 'installed basis' makes ABC the final purchaser of the tangible personal property (materials used to produce Truss).

CUSTOM HOME PACKAGES. ABC also sells 'Custom Home Packages' which is basically the exterior shell of a home. These Custom Home packages consist of lumber, doors, windows and siding. ABC purchases the doors, windows and siding specifically for a Custom Home Package and is aware that the package will be for an Illinois customer at the time these materials are ordered by ABC. The lumber component of the Custom Home Package is made up of inventory located at ABC. At the time the Lumber is ordered by ABC, ABC does not know if it will be used in Custom Home Package or not. ABC is requesting clarification of its sales and use tax liability in Illinois on:

- (1) Custom Home Packages sold to Illinois residents and delivered to an Illinois job site; and
- (2) Custom Home packages sold on an installed basis and installed by ABC at an Illinois Job site.

Our initial review of the facts with respect to Custom Home Package sales indicates that ABC should obtain an Illinois Sales and Use Tax number and begin collecting use tax on deliveries Illinois job sites on an uninstalled basis. ABC should be paying and collecting STATE use tax on Custom Home Packages delivered and installed in Illinois on an installed basis. Custom Home Packages sold on an 'installed basis' makes ABC the final purchaser of the tangible personal property (materials used to produce the Custom Home Package).

ABC's goal in submitting this request is to clarify its Illinois tax reporting obligations with respect to these Illinois deliveries. Please contact the undersigned with any requests for additional information that you may need in providing a response.

DEPARTMENT'S RESPONSE:

For purposes of this general information letter, it is assumed the trusses and "Custom Home Packages" are stock or standard items. For more complete information regarding the tax liabilities of construction contractors, please see 86 Ill. Adm. Code 130.1940 and 130.2075. The Department's Rules and Regulations are available on the Department's Internet website under the heading of "Legal Research."

If a company is engaged in the occupation of entering into and performing construction contracts for customers, it is acting as a construction contractor. In Illinois, construction contractors

are deemed end users of tangible personal property purchased for incorporation into real property. Persons from out-of-State who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of the tangible personal property affixed to that real estate.

Since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to “reimburse” the contractor for his or her tax liability. Please note, the reimbursement cannot be billed to a customer as “sales tax,” but can be listed on a bill as a reimbursement of tax.

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your client would be considered “a retailer maintaining a place of business in Illinois” subject to Use Tax collection obligations.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient “nexus” with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An “Illinois Retailer” is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the out-of State Retailer maintaining a place of business in Illinois. The definition of a “retailer maintaining a place of business in Illinois” is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

Your request indicates that your client is authorized to do business in Illinois. In regards to sales of stock or standard "Custom Home Packages" and trusses, please note, an out-of-State retailer registered in Illinois must collect Use Tax from its sales to Illinois customers.

Persons from other states who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of the tangible personal property affixed to that real estate. If the materials are purchased from an out-of-State supplier that does not collect the Use Tax from the contractor, then the contractor must self-assess and remit the tax directly to the Department.

The Illinois Use Tax Act provides, that in order to prevent multi-state taxation, the Use Tax does not apply to the use, in Illinois, of tangible personal property acquired outside of this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase, or use of such property, to the extent of the amount of such tax properly due and paid in such other state. See 86 Ill. Adm. Code 150.310(a)(3).

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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